a

MALAYSIA BUILDING SOCIETY BHD

v.

JOHORE MINING AND STEVEDORING COMPANY SDN BHD & ANOR

b

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: S24-1580-2002]
8 AUGUST 2003

c ***LAND LAW:*** *Charge - Security - Loan facility for development of land - Remedies of lender - Charge over land not created pending subdivision - Loan disbursed upon strength of power of attorney - Intention of parties - Whether proprietor could refuse to create charge over land - Whether plaintiff entitled to third party charge*

d ***AGENCY:*** *Authority of agent - Power of attorney - Power of attorney granted for valuable consideration - Whether irrevocable - Attorney assigning legal proprietary interest in land - Whether attributable to principal*

The first defendant had sought to develop its land in Kota Tinggi ('the parent
e land') and for the purpose had entered into an agreement with the second defendant. The agreement apart, the first defendant had also executed a power of attorney appointing the second defendant as its attorney *inter alia* to secure financial assistance and to execute the necessary documentation relating to the parent land and the subdivided individual titles thereof ('First Power of
f Attorney'). Armed with the agreement and the First Power of Attorney, the second defendant thus applied for and obtained a loan of RM20 million from the plaintiff. At the time the loan agreement was executed, however, the title to the parent land had been surrendered to the land office, for it to be subdivided into 1019 individual issue documents of titles ('IDTs'), and that
g being so, no charge was created in respect of the parent land and a power of attorney was instead executed by the second defendant in favour of the plaintiff ('Substituted Power of Attorney'). Additionally, a written undertaking was given by the second defendant's solicitors to present the charge as soon as the subdivided titles were issued.

h The second defendant defaulted in the repayment, and following that, the first defendant revoked the First Power of Attorney and, notwithstanding that the 1019 IDTs had been issued in respect of the parent land, refused to execute the charges thereon. Aggrieved, the plaintiff applied for a declaration *inter alia* that it was entitled to third party charges over the 1019 IDTs, as security for

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the loan. Before the learned judge, the primary issues that arose were: (i) whether bearing in mind the documentation and the parties' conduct prior to the disbursement of the loan, the first defendant had intended to charge the parent land to secure the repayment of the loan; and (ii) whether the First Power of Attorney was irrevocable in nature.

Held:

[1] The first defendant had clearly intended to encumber the land in favour of the plaintiff in consideration of the loan being granted to the second defendant. Further, the Substituted Power of Attorney pointed to an assignment by way of a charge conferring an interest in the parent land to the plaintiff as security for the payment of the loan. In other words, the plaintiff had an equitable charge over the parent land pending its conversion and sub-division into 1019 separate IDTs. (p 93 b-d)

[2] At the time the Substituted Power of Attorney was executed, the second defendant was the first defendant's lawful attorney. Hence, the assignment of the legal propriety interest in the parent land and the power to sell and enter possession into the 1019 parcels in the event of default was in fact granted to the plaintiff by the first defendant through its attorney, the second defendant. Consequently, the plaintiff had a proprietary interest in the 1091 IDTs. That proprietary interest is more in the nature of a *right in rem* taking the form of an equitable charge. (pp 93 e-f & 100 c)

[3] In the absence of the allegation that the intended act by the plaintiff to create charges over the 1019 IDTs was *ultra vires* the Substituted Power of Attorney, there cannot be a unilateral revocation of the First Power of Attorney because it was granted for valuable consideration. In any case, a power of attorney coupled with an interest is irrevocable while the interest still subsists. The first defendant admitted that the First Power of Attorney was given for valuable consideration and that would put an end to any argument that the First Power of Attorney was revocable.
(pp 111 d-f & 116 g-h)

[4] The plaintiff was entitled to the declarations sought for. The plaintiff was certainly entitled to the registrable third party charges over the 1019 IDTs owned by the first defendant as security for the loans granted by the plaintiff to the second defendant. (p 106 h-i)

[Application allowed.]

Case(s) referred to:

ARRM Arunasalam Chetty Son Of Sithambaram Chetty v. Teah Ah Poh Trading Under The Style Of Mun Seng Hin Kee & Ors [1937] MLJ Rep 16 ***(foll)***

Associated Portland Cement Manufacturers [1900], Lim, and Imperial Portland Cement Co v. Tolhurst/Tolhurst v. Associated Portland Cement Manufacturers (1900), Lim [1902] KBD 949 ***(refd)***

Barclays Bank LD v. Bird [1954] Ch 274 ***(refd)***

Butler Machine Tool Co Ltd v. Ex-Cell-O Corporation (England) Ltd [1979] 1 All ER 965 ***(refd)***

Chuah Eng Khong v. Malayan Banking Bhd [1999] 2 CLJ 917 FC ***(refd)***

Currie v. Misa [1875] LR 10 Ex 153 ***(refd)***

Gaussen & Other v. W Morton And E Morton [1830] 10 B & C 732 ***(refd)***

Hj Abdul Rahman & Anor v. Mohamed Hassan [1917] AC 209 ***(refd)***

Hoo See Sen & Anor v. Public Bank Bhd. & Anor [1988] 2 MLJ 170 SC ***(refd)***

Housing And Development Board v. Lee Sem Yoong Sdn Bhd [1987] 2 MLJ 204 SC ***(refd)***

Kam Mah Theatre Sdn. Bhd. v. Tan Lay Soon [1994] 1 CLJ 1 SC ***(refd)***

Lloyds Bank v. Trustee of the Property of O, a Bankrupt [1953] 1 WLR 1460 ***(refd)***

Mahadevan & Anor. v. Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266 FC ***(refd)***

Malayan Banking Bhd v. Foo See Moi [1981] 2 MLJ 17 FC ***(refd)***

Mastiara Sdn Bhd v. Motorcycle Industries (M) Sdn Bhd & Ors [1998] 3 CLJ 874 HC ***(refd)***

Muthusamy v. Subramaniam [1965] 2 MLJ 273 HC ***(dist)***

Narayanan Chettiar Raman Chettiar v. Samuel Jivamoney Dass Chelliah [1986] 1 CLJ 579 ***(refd)***

Oh Kuang Liang v. Associated Wood Ind. Sdn Bhd [1995] 2 CLJ 961 HC ***(refd)***

Oriental Bank v. Chup Seng Restaurant (Butterworth) Sdn Bhd [1990] 2 CLJ 711 HC ***(refd)***

Philleoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor [1999] 2 CLJ 1023 CA ***(refd)***

Re Cory [1912] 29 TLR 18 ***(refd)***

Re Hudson [1885] 54 LJ Ch 811 ***(refd)***

Rush & Tompkins Ltd v. Greater London Council [1989] 1 AC 1280 ***(refd)***

Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd [1989] 2 CLJ 142 SC ***(refd)***

Standard Chartered Bank v. Yap Sing Yoke & Ors [1989] 1 CLJ 530 HC ***(refd)***

Swiss Bank Corporation v. Lloyd's Bank Ltd & Ors [1982] AC 582 ***(refd)***

Thomas v. Thomas [1842] 2 QB 851 ***(refd)***

Tingley v. Muller [1917] 2 Ch 144 ***(refd)***

Toh Tiong Huat v. PM Gunasaykaran [1996] 1 SLR 384 ***(refd)***

United Malayan Banking Bhd v. Syarikat Perumahan Luas (No 2) [1988] 3 MLJ 352 ***(refd)***

Walsh v. Whitcomb [1797] 2 Esp 565 ***(refd)***

Williams v. Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1 ***(refd)***

Legislation referred to:
National Land Code 1965, ss. 241(1), (2), (3)(a), (b), (c), (4), 243, 215(3)
Powers of Attorney Act 1949, s. 6
Rules of the High Court 1980, O. 15 r. 16, O. 41 r. 6
Selangor Registration of Titles Regulations 1891, s. 4
Specific Relief Act 1950, ss. 21, 41

Other source(s) referred to:
Trevor M Aldridge, *Powers of Attorney*, 7th edn, p 59

For the plaintiff - Beatrice Loi; M/s Nik Hussain & Partners
For the 1st defendant - V Sithambaram; M/s Sitham & Assocs
For the 2nd defendant - Chen Wai Jiun; M/s. WJ Chen & Co

Reported by WA Sharif

JUDGMENT

Abdul Malik Ishak J:
The prayers sought for by the plaintiff in encl. (1)

The plaintiff sought for the following prayers:

(1) A Declaration against the 1st and 2nd Defendants that the Plaintiff is entitled to the said Charges over the said 1019 Properties as listed in Enclosure 1 to this Summons in Form 16A perfected together with the annexure thereto with terms to secure and ensure payment of the Term Loan Facility of RM20.0 million and the "Bridging Loan" Facility for the sum of RM50 million granted by the Plaintiff to the second Defendant as provided in the Letter of Offer dated 10.12.1996 and the Facility Agreement dated 16.4.1997 (`the said Charges');

(2) A specific performance order against the 1st Defendant as the registered owner of the said 1019 properties as listed in Enclosure 1 to the summons to execute and perfect all relevant documentation and the said Charges on each and everyone of the 1019 issue document of titles in a registrable form and to be registered by the Registrar of Titles for Johore;

(3) And in the event that the 1st Defendant fails, defaults and/or refuse to comply with the order in paragraph 2 above within 7 days from the Order in terms granted in terms herein, then the Plaintiff is entitled to execute and use its powers under the Deed of Assignment with Power of Attorney dated 16.4.1997 executed between the Plaintiff and the 2nd Defendant and also pursuant to the Power of Attorney dated 15.8.1996 executed between the 1st and 2nd Defendants to execute and perfect the relevant documents and the said Charges over each and every one of the 1019 issue document (of) titles in a registrable form and accepted by the Registrar of Titles of Johore;

(4) That the 2nd Defendant pays and is liable for all expenses including but not limited to legal fees, costs, duties, quit rents and assessments, all expenses to the Land Office and related stamp duty in respect of the execution and the registration of said Charges pursuant to the Letter of Undertaking dated 9.4.1997;

(5) Alternatively, a declaration in the event that the registration of the said Charges as per paragraphs 1 and 3 above cannot be executed and/or not registered in the Plaintiff's favour by the Registrar of Titles for Johore for whatsoever reason then the 1st Defendant is liable and is obligated to refund the RM20.0 million together with interest on a rate and for a period of time that the Court deems fit to the Plaintiff based on the Letter of Undertaking dated 9.4.1997;

(6) A declaration that the Plaintiff does not bear any burden, duties, obligations and/or any liabilities towards the 1st Defendant under the Profit Sharing Agreement dated 15.8.1996;

(7) Costs; and

(8) All directions or further reliefs which this Honourable Court deems just and expedient.

Both The Defendants Were Issued With The Necessary Notice To Enter An Appearance And That Notice Was Worded As Follows:

To:

1. Johore Mining And Stevedoring Company Sdn Bhd
(No. Sykt: 004095-M)
Suite 23.01, Level 23
Public Bank Tower
No. 19 Jalan Wong Ah Fook
80000 Johor Bahru

2. Pintas Mewah Sdn Bhd
(No. Sykt: 391116)
Tingkat 12, (Right Wing)
Menara Kemayan
No. 160 Jalan Ampang
50450 Kuala Lumpur

Let the abovenamed 1st Defendant within twelve (12) days and the abovenamed 2nd Defendant within eight (8) days after service of this summons on them, inclusive of the day of service, caused an appearance to be entered to this summons, which is issued on the application of (the) Plaintiff, Malaysia Building Society Berhad of Tingkat 11, Wisma MBSB, No. 48 Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur.

It seemed that the second defendant has not entered an appearance and this prompted the plaintiff to seek the necessary prayers thereto.

Facts Of The Case

The first defendant owned a land at the district of Pantai Timur, Kota Tinggi held under mining certificate no: 1130 Lot No: 1229 and mining certificate no: 1131 Lot No: 1230, which was converted to mining lease 563 Lot 1229 and mining lease 564 Lot No: 1230 (hereinafter referred to as the "parent land") and it was subsequently converted and sub-divided into 1019 separate individual issue document of titles as listed in encl. (1) to the originating summons dated 15 April 2002 (hereinafter referred to as the "1019 IDTs").

The first and the second defendants entered into a profit sharing agreement dated 15 August 1996 to erect a mixed development project on the parent land and the first defendant proceeded to appoint the second defendant as its lawful attorney. At all material times, especially in relation to matters connected with the parent land, the second defendant was the first defendant's lawful attorney. This power of attorney was granted on 15 August 1996 (hereinafter referred to as the "first power of attorney").

As a financial institution, the plaintiff has agreed to grant the following loan facilities to the second defendant:

(a) a term loan for the sum of RM20 million for the part purchase of the parent land and as consideration for the first defendant to grant the second defendant the first power of attorney; and

(b) a bridging loan for the sum of RM70 million to finance the development costs of the mixed development project to be erected on the parent land.

As authorised by the second defendant only the term loan was released. And that term loan of RM20 million was released directly to the first defendant.

In due course, the parent land was surrendered to the land office for conversion and sub-division exercises. Pending the issuance of the separate and individual issue document of titles, a deed of assignment with power of attorney was executed as, *inter alia*, security for the repayment of the term loan as advanced to the second defendant. The deed of assignment was executed by the second defendant as an attorney for the first defendant. The second defendant executed the power of attorney dated 16 April 1997 within the deed of assignment conferring the plaintiff with the status of a substituted power of attorney with limited powers (hereinafter referred to as the "substituted power of attorney").

The second defendant failed to settle the payment of its monthly instalments and/or the entire amount under the term loan despite several demands made by the plaintiff and its solicitors. It was quite exasperating on the part of the plaintiff. And as at 1 November 2001, the amount due and owing to the plaintiff came up to RM32,058,178.78 together with interest at the rate of 9.50% per annum together with the additional interest of 1.00% per annum on a monthly rest from 2 November 2001 until full settlement.

The 1019 IDTs were eventually issued but the first defendant refused and/or neglected to execute charges on the IDTs. The first defendant has also revoked the first power of attorney that was granted to the second defendant.

These were the brief facts of the case and I will elaborate on them in the course of this judgment.

Issues To Be Adjudicated

For convenience, the following issues will be considered:

(1) Whether the plaintiff is entitled to the registrable third party charges over the 1019 IDTs owned by the first defendant as security for the loans granted by the plaintiff to the second defendant?

(2) Whether the first power of attorney dated 15 August 1996 granted by the first defendant to the second defendant was revocable?

(3) Whether the plaintiff was obliged to perform all the obligations of the second defendant under the profit sharing agreement that was entered between the first and the second defendants dated 15 August 1996 by virtue of the substituted power of attorney that was executed between the second defendant and the plaintiff dated 16 April 1997 and styled as the deed of assignment (with power of attorney) as seen in "MBSB10" of encl. 3?

(4) Whether a compromise and settlement had been concluded between the plaintiff and the second defendant which had the effect of a settlement of the entire dispute between the parties?

I shall now proceed to examine these four issues in quick succession.

The First Issue

It was the submission of the plaintiff that after construing all the expressed terms of all the relevant documents executed between the plaintiff and the defendants coupled with the parties' conduct prior to the disbursements of the term loan of RM20 million, it showed that the first defendant clearly intended to secure the debt owed by the second defendant by charging its land. This

was a rather interesting submission. It seemed that the plaintiff's stand was fortified by the fact that the plaintiff was subsequently given the possession of the 1019 IDTs.

The facts that led to the disbursement of the term loan of RM20 million should be delved deeper. That would show the relationship between the first defendant and the second defendant prior to the second defendant approaching the plaintiff for that term loan. The relevant documents and correspondences exchanged between the parties before the release of the term loan would also be useful to refer. Reference too should also be made to the expressed terms in the security and loan documents as well as the damning act of surrendering the 1019 IDTs by the defendants to the plaintiff.

I will now examine the relationship between the first defendant and the second defendant. For this purpose, I will refer to the profit sharing agreement dated 15 August 1996 as seen in exh. "MBSB1" of encl. 3. That profit sharing agreement makes for an interesting reading material. The sting of cls 2.1, 3.1 and 5.1 of the profit sharing agreement may be stated as follows. The second defendant was to develop and sell completed units of houses, apartments, shophouses and factories which comprised the mixed development project erected on the parent land. The agreed profit sharing distribution between the second defendant and the first defendant were in the proportion of 60% - 40%. There was no doubt that, at the material time, both the second defendant and the first defendant were fully aware that the second defendant would require financial assistance to develop the mixed development project on the parent land and that the parent land would be used as a security. It was also the intention of the parties that the second defendant would be appointed as the first defendant's attorney in the execution of any documentation relating to the parent land and the sub-divided individual titles. This would also include any documents that would, *inter alia*, encumber the parent land and the sub-divided titles (see the first power of attorney that was granted by the first defendant to the second defendant dated 15 August 1996 particularly cls (a), (f) and (k) thereof as seen in exh. "MBSB2" of encl. 3). It would also be ideal to refer to the profit sharing agreement particularly cls 7.1, 7.3, 7.4, and 11 and I shall now reproduce them verbatim:

Project Funding

7.1 The developer shall be permitted and authorised to raise loans or credit facilities from any financier whether by way of syndication, club loan or otherwise to meet its obligations for the advance payment of the Minimum Guaranteed Profits and the costs of carrying out the Development Project and such loans or credit facilities shall be guaranteed by the Developer.

7.3 For the purpose of raising the Loan, the Owner shall allow the said Lands to be encumbered in favour of the Financier by way of a Charge or other types of security instruments as shall be required by the Financier and the Owner hereby undertakes, without any undue delay, to execute such documentation as may be reasonably necessary or required to assist the Developer to obtain the Loan.

7.4 Any amount of the Loan not immediately required for the purpose stated in Clause 7.1 herein shall be deposited into the Project Account. The Developer shall manage the Project Account and is hereby vested with the power and authority to utilise all monies in the Project Account for and pertaining to the Development Project. To this end, the Developer is further vested with the power and authority to instruct the Financier to directly make payment of the Loan either in one lump sum or otherwise into the Project Account for the same. In consideration of the aforesaid, the Developer undertakes with the Owner to maintain and upkeep the interest and/or instalment payments under the Loan.

11. Power of Attorney

The Owner hereby agrees that to enable the Developer to expedite the development of the said Lands, the Owner agrees that simultaneously with the execution of this Agreement, the Owner shall grant to the Developer an irrevocable Power of Attorney in the form appearing in (the) Schedule hereto.

So, in order to develop the mixed development project and in accordance with the wishes of both parties, the second defendant approached the plaintiff for the term loan. And the purpose of that term loan of RM20 million was basically to part finance the land cost of the parent land as well as for the consideration of granting the first power of attorney while the term loan of RM50 million was for the costs of the development. The letter dated 10 December 1996 from the plaintiff to the second defendant as seen in exh. "MBSB3" of encl. 3 at cl. (1) thereto would be worth reproducing and I shall do so now:

1. Purpose of Loans:

Term Loan – RM20.0 Million

The Term Loan of Ringgit Malaysia Twenty Million (RM20.0 million) is to part finance the land cost of Lots Nos. 1229 and 1230, Mukim Pantai Timur, District of Kota Tinggi, known as the 'Project Land'. It is payable to Johore Mining and Stevedoring Company Sdn Bhd ('the Landowner'), as consideration for granting the Power of Attorney to Pintas Mewah to develop the Project Land.

Bridging Loan – RM50.0 Million

The Bridging Loan of Ringgit Malaysia Fifty Million (RM50.0 million) is to be utilised in four (4) tranches as follows:-

Tranche 1 – RM10.0 Million

Ringgit Malaysia Ten Million (RM10.0 million) is for the development of 77 units of shophouses in Phase 1a.

Tranche 11 – RM13.0 million

Ringgit Malaysia Ten Million (RM10.0 million) is for the development of 70 units of shophouses and Ringgit Malaysia Three Million (RM3.0 million) is for the development of 111 units of single storey terrace houses in Phase 1b.

Tranche 111 – RM3.0 Million

Ringgit Malaysia Three Million (RM3.0 million) is for the development of 111 units of single storey terrace houses in Phase 1c.

Tranche IV – RM24.0 Million

Ringgit Malaysia Twenty Four Million (RM24.0 million) is for the development of 66 units of double storey bungalow houses and 116 units of double storey semi-detached houses in Phase 1d.

It seemed that the plaintiff and the second defendant shared a common solicitor's firm in the preparation and the execution of the loan documentation as reflected in exhs "MBSB19" and "MBSB20" of encl. 18. Only the term loan for the sum of RM20 million was released, as authorised by the second defendant, to the first defendant directly as reflected in exh. "MBSB5" of encl. 3. Now, prior to the release of RM20 million, the plaintiff obtained the following documents from the first defendant:

(1) the first defendant's director's resolution dated 12 June 1999 as seen in exh. "MBSB8" of encl. 3 which was worded as follows (the relevant parts only):

> … the Company be and is hereby authorised to offer its lands … together with all sub-divided titles issued thereon, to be used by Pintas Mewah Sdn Bhd (referring to the second defendant) as security for a term loan of RM20 million and a Bridging Loan of RM50 million granted by Malaysia Building Society Berhad (referring to the plaintiff) to Pintas Mewah Sdn Bhd (referring to the second defendant) in accordance with Malaysia Building Society Berhad's letter of offer dated 10th December 1996 and to any amendments variations or modifications made thereto and that in this respect the Company (referring to the first defendant) be and is hereby authorised to execute all the requisite authority

resolutions a Third Party Charge and such documentation as may be required by Malaysia Building Society Berhad (referring to the plaintiff).

(2) the letter dated 9 April 1997 from the first defendant to the plaintiff marked as exh. "MBSB4" of encl. 3 and the contents of that letter were as follows:

> We refer to the letter of offer dated 10th December, 1996. We undertake to refund the Term Loan of RM20.0 million released to us in the event that sub-divided titles of the Lands are not issued by the relevant authority in the name of Johore Mining & Stevedoring Company Sdn Bhd (referring to the first defendant) for any reason whatsoever and/or when issued cannot be charged in your favour for security of the above loans to Pintas Mewah Sdn Bhd (referring to the second defendant).

(3) the plaintiff also obtained the following letters:

(a) letter dated 30 April 1997 from the second defendant to the plaintiff marked as "MBSB6" of encl. 3;

(b) letter from the second defendant to M/s TK Lim & Co dated 9 April 1997 marked as "MBSB7" of encl. 3;

(c) letter from M/s TK Lim & Co to the plaintiff dated 30 April 1997 marked as "MBSB22" of encl. 18;

(d) letter from the second defendant to the Kota Tinggi land office dated 9 April 1997 marked as "MBSB23" of encl. 18; and

(e) letter from M/s TK Lim & Co to the plaintiff dated 30 April 1997 marked as "MBSB24" of encl. 18.

The letters marked as "MBSB23" and "MBSB24" of encl. 18 must be highlighted. The former was a letter of authorisation to M/s TK Lim & Co from the second defendant for collection of the 1019 IDTs after the parent land had been converted and sub-divided. The latter was a letter of undertaking by M/s TK Lim & Co as solicitors for the second defendant to present the charge in the plaintiff's favour as soon as the sub-divided titles of the parent land has been issued and to forward the same to the plaintiff thereafter.

The letters marked as "MBSB4" and "MBSB6" of encl. 3 as alluded to earlier were in fact letters of undertakings from the first defendant and the second defendant to refund the term loan of RM20 million in the event that the charge cannot be registered over the sub-divided titles and/or the 1019 IDTs.

There was also a letter of undertaking from the second defendant to M/s TK Lim & Co to pay the necessary fees, disbursements and the stamp duties in connection with the creation of the charge over the sub-divided titles and/or

the 1019 IDTs. The fact that there was the usage of the common solicitors for the loan and/or the security documentation confirmed beyond per adventure that a charge in escrow was in its possession before advising the release of the term loan of RM20 million to the first defendant directly. Thus, it would be apparent that based on the aforesaid documents there can be no doubt that the first defendant clearly intended to encumber the land in favour of the plaintiff in consideration of the loan being granted to the second defendant.

Furthermore, the substituted power of attorney dated 16 April 1997 was in fact a deed of assignment (with power of attorney) executed by the second defendant as the assignor and the plaintiff as the assignee as reflected in "MBSB10" of encl. 3. Now, a perusal of the substituted power of attorney would clearly show an assignment by way of a charge conferring an interest in the parent land to the plaintiff as a security for the payment of the loan advanced to the second defendant. Put differently, the plaintiff had in fact an equitable charge over the parent land pending the conversion and sub-division of the parent land into 1019 separate individual IDTs. Of course, drafting has always been a difficult area of the law to dwell into. The wordings of the substituted power of attorney may in some manner be lacking in its precision. Perhaps too it may even be confusing at first glance for someone who has no knowledge of the relationship between the first and the second defendants. But, as far as the plaintiff and the second defendant were concerned, there was not an iota of doubt in their minds that at the time the substituted power of attorney was executed the second defendant was, at all material times, the first defendant's lawful attorney. So, it can be surmised that the assignment of the legal proprietary interest in the parent land and the power to sell and enter possession in 1019 individual parcels in the event of default was in fact granted to the plaintiff by the first defendant through its attorney – the second defendant. That would be the correct conclusion to arrive at after and upon reading the substituted power of attorney. Any other conclusion would run counter to the express words of the substituted power of attorney, in particular, cls 2, 3.1, 3.2, 3.3 and 5.4 thereof.

The recital to the loan agreement between the plaintiff as the lender and the second defendant as the borrower dated 16 April 1997 as seen at the second exhibit to "MBSB3" of encl. 3 reads as follows:

> At the request of the Borrower (referring to the second defendant), the Lender (referring to the plaintiff) has agreed to grant to the Borrower a term loan facility of RM20 million only to part finance the purchase price of the said land ... .

Under that Loan Agreement, the word "charge" is defined as follows:

> A third party first legal charge over the said land to be executed by the Landowner in favour of the Lender as security for the Loans.

a And under the loan agreement, "landowner" is defined as the:

> Johor Mining And Stevedoring Company Sdn Bhd (4095 M) a company incorporated in Malaysia and having its registered office at No: 2A, Jalan Padi Mahsuri 12, Bandar Baru UDA, Tampoi, 81200 Johor Bahru.

b Again, under the loan agreement, the "said land" refers to the parent land and after sub-division it would be the 1019 IDTs. Clause 2(1)(i) of the loan agreement reads as follows:

> 2(1) The Borrower represents and warrants to and undertakes with the Lender as follows:
>
> *c*
>
> (i) that the said Land has been alienated to the Landowner who has had submitted the said land to the Johore State Land Authority for conversion and subdivision thereof into 2,405 sub-divided building plots the individual titles for which are pending issuance.

d And cl. 7(1)(b) of the loan agreement reads as follows:

> 7. Security
>
> (1) For better securing the repayment and payment of all principal sum interest and any other moneys and liabilities whatsoever owing or payable by the Borrower to the Lender in respect of the Loans and under the
> *e*
> provisions of this Agreement the Borrower shall on or before execution of this Agreement:
>
> (b) to cause the Landowner to execute and deliver in favour of the Lender a third party first charge over the said Land in form and content acceptable to the Lender.
> *f*

Clause 9(c) and cl. 9(d) of the loan agreement would also be relevant to consider. It reads as follows:

> 9. Conditions Precedent to Drawdown
>
> *g* The following events are specified as conditions precedent to the disbursement of the Loans. The obligation of the Lender to make disbursement of the Loans is subject to the fulfilment, in (the) manner satisfactory to the Lender prior to the making of any disbursement, of the following conditions:
>
> *h* (c) That the charge shall have been duly executed and deposited with the Lender's solicitors;
>
> (d) That the Lender shall have received in form and substance satisfactory to it, copies certified as true by the Borrower's authorised signatory or company secretary of its Memorandum and Articles of Association, Form
> *i*

49 (as prescribed under and complying with section 141 of the Companies Act 1965) and the respective Board Resolution pertaining to the Loans the execution of this Agreement, the Deed of Assignment and the Debenture.

It would be germane to mention that the letters of undertakings obtained by the plaintiffs as reflected in exhs. "MBSB4", "MBSB6", "MBSB7" of encl. 3, "MBSB22", "MBSB23", "MBSB24" of encl. 18 and as alluded to earlier were in total accord with cls 9(q), 9(r), 9(s) and 9(t) of the loan agreement. In my judgment, the intention to create a third party charge can never be disputed. It seemed to me that the only reason why a charge was not executed but instead the substituted power of attorney was executed was because the parent land was surrendered to the land office for conversion and sub-division into 1019 IDTs. The "recitals" to the substituted power of attorney read as follows (the relevant parts only):

1. By a Profit Sharing Agreement dated 15th August. 1996 (hereinafter referred to as 'the Profit Sharing Agreement') and made between PINTAS MEWAH SDN. BHD. (391116 P) a company incorporated in Malaysia and having its registered office at No. 22, Changkat Bukit Bintang, 50200 Kuala Lumpur (hereinafter referred to as 'PINTAS') of the one part and JOHOR MINING AND STEVEDORING COMPANY SDN. BERHAD (4095 M) a company incorporated in Malaysia and having its registered office at No. 2A, Jalan Padi Mahsuri 12, Bandar Baru UDA, Tampoi, 81200 Johor Bahru (hereinafter referred to as 'JOMIS') of the other part, whereby JOMIS has agreed to grant PINTAS the absolute right to undertake the development of the said Land (as hereinafter defined) into a housing scheme (hereinafter referred to as `the Project') with an option to purchase the said Land from JOMIS to be exercised within thirty six (36) months from the date of the Profit Sharing Agreement at the consideration sum and on the terms and conditions set out in the Profit Sharing Agreement.

3. Pending the issuance of separate individual title to the said Land, MBSB has agreed to accept this Assignment of the rights, title and interest of PINTAS in and to the said Land pursuant to the Profit Sharing Agreement as security for the Loan upon the terms hereinafter set out and contained.

And one may ask, what are the terms and conditions as set out in the profit sharing agreement? Surely both the plaintiff and the second defendant would have referred to the profit sharing agreement and the power of attorney granted by the first defendant to the second defendant in ascertaining their respective rights. These terms and conditions should in turn be read together with the substituted power of attorney. I will now allude to these documents.

a Clause 11 of the profit sharing agreement relates to the power of attorney and I have reproduced it earlier. This would be followed by the relevant clauses in the first power of attorney dated 15 August 1996 as seen in exh. "MBSB2" of encl. 3. At p. 1 of the first power of attorney, the following terms appear:

b NOW THIS DEED WITNESSETH that the Donor do hereby appoint the Attorney (Provided Always the term 'Attorney' in this Power of Attorney includes the directors of the Attorney) to be the true and lawful attorney of the Donor in the name and on behalf of the Donor to do all or any of the acts and things followings:

c (a) For the purpose of developing the said Project on the said Lands to execute, sign, seal and deliver as such attorney in the name and on behalf of the Donor all documents, deeds, instructions, agreements, contracts, acknowledgements, charges and mortgages in respect thereof as amply effectually to all intents and purposes as the Donor could have done.

d At p. 2 of the first power of attorney, cls (f) and (k) state:

(f) To pledge, mortgage or charge the said Lands or any part thereof to any licensed financial institution as security for any credit or loan facilities to be utilised for the development of the said Project as if the Attorney is the actual legal and equitable owner of the said Lands.

e (k) To substitute and appoint from time to time one or more attorney or attorneys with the same or more limited power and such substitute or substitutes shall have the pleasure to remove or to appoint another or others.

f Finally, at p. 3 of the first power of attorney, the following clause appears:

AND it is hereby declared that this Power Of Attorney is given for valuable consideration and shall be irrevocable.

Special mention must be made in regard to the substituted power of attorney *g* as seen in exh. "MBSB10" of encl. 3 where there are clauses found therein which dealt with the plaintiff's remedies against the parent land when there is an event of default and I shall now refer to these salient clauses. Clause 2.1 of the substituted power of attorney states as follows:

h 2.1 **ASSIGNMENT**

In consideration of MBSB agreeing having agreed at PINTAS's request to advance and or continuing to advance the Loan to PINTAS and on the terms and conditions of the Loan Agreement, PINTAS HEREBY ABSOLUTELY ASSIGNS to MBSB as security for the Loan all its entire rights title and

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interest in and under the Profit Sharing Agreement and all stipulations therein contained and all remedies for enforcing the same and all its rights, title and interest in respect of the said Land which MBSB hereby accepts and PINTAS shall at all times hereafter save harmless and keep MBSB indemnified against all actions proceedings damages penalties costs claims and demands by reason or on account of the breach or non-observance of all or any of the stipulations on the part of PINTAS to be performed and observed and contained in the Profit Sharing Agreement or otherwise howsoever by reason or on account of this Assignment.

This would be followed by cls. 3.1, 3.2, 3.3 and 5.4 of the Substituted Power Of Attorney:

3.1 **LICENCE**

Notwithstanding anything in this Assignment contained, it is hereby declared that PINTAS shall during the continuance of this Assignment retain possession of the said Land as the licensee of MBSB and no other right until this licence (hereinafter referred to as 'the said Licence')is terminated under the provisions of Article 3.2 hereof and within seven (7) days or such other time as stipulated by MBSB, after the said Licence to occupy the said Land is terminated in the manner herein provided, PINTAS shall immediately give vacant possession of the said Land to MBSB.

3.2 **TERMINATION OF THE SAID LICENCE AND SALE OF THE SAID LAND**

If PINTAS shall for any reason whatsoever fail to repay the whole amount due after expiry of the notice of demand hereof MBSB shall be entitled to terminate the said Licence forthwith by notice to PINTAS and further forthwith to sell or otherwise deal with the said Land or any part thereof by public auction or private treaty at such price and upon such terms and conditions as MBSB may in its absolute discretion consider reasonable.

3.3 **CONSEQUENCE OF TERMINATION OF THE SAID LICENCE**

Upon the said Licence being terminated under the provisions of Article 3.2 hereof, MBSB shall have the right to enter upon the said Land or any part thereof and to deal with all the rights title and interest in relation to or in, as the case may be, the said Land as the person absolutely and beneficially entitled thereto including the right and power to sell or otherwise deal with the said rights title and interest in relation to or in the said Land or any part thereof in accordance with the provisions of Article 3.2 hereof and no assignee, lessee, tenant or purchaser from MBSB shall be concerned to enquire whether any such default has in fact been committed by PINTAS or any occasion has arisen for the exercise of MBSB's rights and powers of assignment, leasing, letting or sale hereunder.

5.4 **REMEDIES OF MBSB**

If PINTAS shall have failed to pay the sum for the time being owing to MBSB upon demand made by MBSB or to remedy within the period specified in the notice served pursuant to the Loan Agreement, the breach complained of in the said notice, MBSB shall have the following rights and powers:-

(a) **Termination of Licence**

The right to terminate the said Licence and take possession of the said Land or any part or parts thereof;

(b) **Power of Sale**

(i) In relation to the exercise of the power of sale conferred upon it herein, MBSB be at liberty to act as it shall deem fit and necessary and to exercise such power of sale.

(ii) For the purpose of this Clause, the power of sale shall include a power to appoint a receiver and or receiver and manager and the power to take all other actions conferred on MBSB by the Loan Agreement or any of them upon the occurrence of an Event of Default by PINTAS.

(c) **Power to Grant Leases/Tenancies**

(i) MBSB shall be entitled in so far as the said Land is not subject to a lease/tenancy and is not occupied by PINTAS, to grant leases/ tenancies of the said Land at such rent and upon terms as MBSB deems fit and to receive the rent payable thereunder.

(ii) MBSB, intending to grant leases/tenancies of the said Land and receive the rent payable thereunder, shall serve a notice (hereinafter referred to as 'the Lease/Tenancy Notice') to such effect upon PINTAS.

(iii) PINTAS hereby undertakes that it will, on the date specified in the Lease/Tenancy Notice, deliver vacant possession of the said Land to MBSB or to any person or persons authorised by MBSB.

(iv) Leases/tenancies of the said Land granted by MBSB shall be made by MBSB upon such terms as MBSB deems fit and, as MBSB shall determine, in the name and on behalf of PINTAS or the joint names of PINTAS and MBSB.

(d) **Power to Accept Surrenders**

MBSB in receipt of rent under any leases/tenancies of the said Land may accept the surrender of leases/tenancies under which the rent is payable.

(e) **Rights and Powers under the Profit Sharing Agreement**

MBSB shall be entitled to exercise all rights and powers vested in PINTAS under the Profit Sharing Agreement and this Assignment."

While clause 6.1 of the Substituted Power Of Attorney states as follows:

6.1 **ISSUE OF SEPARATE DOCUMENT OF TITLES**

Upon the issue of the Sub-divided individual Document of Titles to the said Land, PINTAS shall (but without prejudice to MBSB's right and power to sign the same under the Power of Attorney) at its own cost and expense procure the execution of a Third Party First Legal Charge by JOMIS over the said Land under the National Land Code in favour of MBSB together with all other documents forms and instruments as may be necessary, to cause MBSB to be registered as Chargee on the Sub-divided individual Titles over the said Land.

And cl. 7.1 of the Substituted Power Of Attorney is worded as follows:

7.1 **VALIDITY OF THIS ASSIGNMENT**

This Assignment shall remain in full force until and unless the Third Party First Legal Charge are duly registered against the Sub-divided individual titles of the said Land or the whole of the Loan secured by the said Land together with interest thereon and all other monies payable to MBSB hereunder are paid in full whichever first happens.

Now, I have this to say. Based on cls 6.1 and 7.1 of the substituted power of attorney, all the three parties thereto agreed that the second defendant could execute the charges on and upon the issuance of the separate individual 1019 IDTs. This, however, would not prejudice the plaintiff's right to do likewise by using its power of attorney.

It must be borne in mind that there was no dispute whatsoever that the term loan of RM20 million had been released to the first defendant on or about 7 May 1997. There was also no dispute that subsequently the plaintiff was given possession of the 1019 IDTs. But there was an allegation by the first defendant as seen in para. 15 of the first defendant's first affidavit in reply in encl. 8 to the effect that the 1019 IDTs were handed over to the plaintiff merely at the insistence of the plaintiff and the threat to break-off negotiations for a settlement. With respect, this allegation is totally untenable. It can be easily rebutted by the first defendant's silence and the non-objection prior to the filing of encl. 8. It must be borne in mind that when the plaintiff issued its letter dated 26 September 2001 through its solicitors as seen in exh. "NCM16" of encl. 8 ending all negotiations for settlement, there was no protest nor demand

for the return of the 1019 IDTs. This non-protest continued unabated and it continued right up to the point of the first defendant's solicitor's letters dated 20 February 2002 and 3 April 2002 as seen in exhs. "MBSB15 (a) - (b)" and "MBSB17 (a) – (c)" of encl. 3 respectively. This was the damning conduct of the first defendant and it can be inferred that the first defendant had acquiesced if not conceded to the plaintiff's possession of the 1019 IDTs.

From the narration of the salient facts as alluded to above, I must categorically say that the plaintiff has a proprietary interest in the land in question, namely, the 1019 IDTs. That proprietary interest is more in the nature of a right in rem. It takes the form of an equitable charge and it is recognised by our Federal Court in the case of *Mahadevan & Anor. v. Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266. Speaking for the Federal Court, Salleh Abas CJ (Malaya) aptly said in that case at p. 270 to p. 271:

> But the subsequent Land Code and the present National Land Code do not contain provisions similar to section 4 of the above quoted Regulation, although the Codes make provisions as to how a charge or a lien could be created. Examination of courts' decisions clearly show that the courts have resorted to equitable principles and consistently held that an agreement or an arrangement to secure a debt in favour of the creditor in respect of the debtor's land creates an equitable charge giving rise to an equitable right in favour of the creditor, although no charge or lien within the provisions of the National Land Code or the previous Code is executed or created. (see *Ngan Khong v. Bamah bt. Pakeh Jamin & Anor* [1935] F.M.S.L.R. 81; [1935] M.L.J. 167; *Arunasalam Chetty v. Teah Ah Poh Trading (supra)*; *Vallipuran Sivaguru v. Palaniappa Chetty* [1937] M.L.J. 59 and *Mercantile Bank v. Official Assignee* [1969] 2 M.L.J. 196). The basis of this ruling is the very raison d'etre of the court's own existence and the imputed intention of the legislature . Terrell, Ag. C.J. in *Arunasalam Chetty*'s case (supra) said:
>
> > ... It is the duty of the Courts to do justice between parties, and unless expressly prohibited by Statute law, to give effect to ordinary commercial transactions, such as the advance of money on the security of title deeds … (p. 22)
> >
> > …but it is difficult to believe that it was the deliberate intention of the Kedah legislature by the mere omission to exclude the recognition of the principle of an equitable deposit. (p. 21)
>
> These statements were supported by Whitley, Ag. C.J. (S.S.) who sat in the same case and said:
>
> > ... the Courts will recognise equitable estates and rights except so far as they are precluded from doing so by the statutes. (p. 18)

Raja Azlan Shah J (as he then was) reaffirmed this judicial attitude in Mercantile Bank Ltd case (supra) when he said:

> ... unless there are express words in the Act, this court is not precluded from giving effect to equitable rights existing between the parties… (p. 197)

There is, however, no provision in the National Land Code prohibiting the creation of equitable charges and liens. The Code is silent as to the effect of securities which do not conform to the Code's charge or lien. Therefore equitable charge and liens are permissible under our land law. We, therefore, think that the words 'or other charge on land' in section 21 (1) of the Limitation Act must be construed to include equitable charges and liens as well.

The issue of equitable mortgage was discussed in the case of *Chuah Eng Khong v. Malayan Banking Bhd* [1999] 2 CLJ 917, FC, and the facts may be stated as follows. There the appellant ("the borrower") entered into a loan agreement ("the loan agreement") with the respondent ("the lender") by which it borrowed RM60,000 to pay the purchase price of some lands ("the land"), and agreed to pay interest thereon. In consideration thereof, the borrower assigned to the land all his rights, title and interests in the land as security for the loan. Subsequently, the borrower defaulted in his repayment instalments and interest and the lender filed an action in the Sessions Court for the whole sum together with interest thereon. Summary judgment was given by the Sessions Court but neither party appealed against it. Based on the summary judgment, the lender caused to be issued a bankruptcy notice, claiming interest at the higher contractual rate as per the loan agreement and not at 8% per annum as granted in the summary judgment. The lender contended that it was entitled to keep the document of title because a mortgagee is entitled to retain the security until the contractual interest stipulated by the mortgage has been paid. The Court of Appeal found that under the loan agreement, the covenant to pay interest was an independent covenant. The borrower appealed on the ground that the loan agreement was not a charge or mortgage, and that the covenant on the contractual rate of interest had merged into the summary judgment of the Sessions Court. It was argued that *res judicata* applied to the summary judgment and the lender could only claim interest at 8% per annum. Peh Swee Chin FCJ speaking for the Federal Court held that:

(1) At common law and under the rules of equity, the loan agreement would amount to an equitable mortgage because the assignment of the rights, title and interests in the land was expressly for the purpose of securing the loan. Although no where in the loan agreement was the word "mortgage" used, it was a security transaction in connection with the loan given by the lender with a provision for repayment, after which, the borrower would

be entitled to obtain a discharge and release of the land from the lender. The borrower at the time of signing the loan agreement, had no legal estate but only an equitable interest as a purchaser by contract from a housing developer. This gave the borrower a second right to redeem after the contractual right to redeem the land by a contractual date had lapsed due to the expiry of time.

(2) As the loan agreement was an equitable mortgage, the next issue was whether such equitable mortgage could exist in the face of the National Land Code, 1965 ("the NLC"). The NLC does not contain any provision similar to s. 4 of the Selangor Registration of Titles Regulations 1891 which would render such equitable mortgage as null and void. Therefore, the decision of *Hj Abdul Rahman & Anor v. Mohamed Hassan* [1917] AC 209 in refusing to uphold the agreement there on account of the said s. 4 should not be used as an authority to invalidate any equitable mortgage or equitable charge created by contract outside any enactment of the Torrens System's of registration of titles such as the NLC. Therefore, the submission that the loan agreement did not create any interest in land was fallacious. The submission that the loan agreement was a mere chose in action dealing with personal property, as opposed to land, would fly in the face of the said interests in the land.

The law may be stated as follows. A charge may be created over the whole of any alienated land or lease or undivided share therein (s. 241(1) of the NLC) in order to secure the repayment of any debt or the payment of any sum other than a debt or of any annuity or other periodic sum. Under the NLC, a charge will take effect as a security transaction only upon registration . Once registered, the land, lease or undivided share would be liable as security for the loan or sums of money that have been advanced (s. 243 of the NLC). In *Mahadevan & Anor v. Manilal & Sons (M) Sdn Bhd (supra)*, the Federal Court held that an agreement to secure a debt in favour of the creditor in respect of the debtor's land may create an equitable charge giving rise to an equitable right in favour of the creditor although no charge within the provisions of the NLC has been executed or created. But it would appear on the authority of *Oriental Bank v. Chup Seng Restaurant (Butterworth) Sdn Bhd* [1990] 2 CLJ 711, that until the charge is registered, the unregistered chargee has no right to enforce the charge under the NLC, but nevertheless recourse under the contract may still be available. And on the authority of *Standard Chartered Bank v. Yap Sing Yoke & Ors* [1989] 1 CLJ 530, where the unregistered chargee has custody of the issue document of title, there may also be a right to a lien. So, as the law now stands, that under the NLC a charge duly registered amounts to an interest in land (s. 215(3) of the NLC).

Now, the powers of the registered proprietor to charge his land include the right to create the second and the subsequent charges (s. 241(2) of the NLC). But, generally speaking, in exercising such powers the registered proprietor would be subject to any prohibition or limitation as imposed by the NLC or any other written law like the Malay Reservations Enactments of the respective States in Peninsular Malaysia for the time being in force as well as to any restriction in interest to which the land in question is for the time being subject to (*United Malayan Banking Bhd v. Syarikat Perumahan Luas (No: 2)* [1988] 3 MLJ 352) and, in regard to leases, the express or implied provisions provided therein (s. 241(3)(a), (b) and (c) of the NLC). Under s. 241(4) of the NLC, a charge may be granted to two or more persons or bodies as trustees or representatives to be held by them jointly.

The Court of Appeal in the case of *Philleoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor* [1999] 2 CLJ 1023 referred to the case of *Swiss Bank Corporation v. Lloyd's Bank Ltd and Others* [1982] AC 582 and said (see p. 1040 to p. 1042 of the *Philleoallied Bank (Malaysia) Bhd*'s case):

> Concept apart, there is also a difference in point of remedies between these two forms of security. I take it as settled that for the most part the remedies available to an equitable mortgagee are the same as those available to an equitable chargee. However, the important remedy of foreclosure which is available to the former is not available to the latter. See, *Tennant v. Trenchard* [1869] 4 Ch. App. 537, at p. 542.
>
> My reading of the leading works and decided cases upon the subject have led me to the conclusion that in English equity jurisprudence, an equitable mortgage is created in four distinct situations, subject always to a contrary intention being expressed in the relevant instrument or being found to exist inferentially from the surrounding circumstances of the particular case. The four instances are these:
>
> (1) When money is lent on the strength of a deposit by the borrower of title deeds to real property as security for the loan.
>
> (2) Where a loan is secured by an ineffectual attempt to create a legal mortgage to secure the transaction.
>
> (3) Where the subject matter of the mortgage is an equitable interest in property.
>
> (4) Where a loan is made upon an agreement by the borrower to create a legal mortgage.
>
> I have laid emphasis upon the position in English equity jurisprudence for the purpose of reminding myself that our courts, while under a statutory

direction to apply the rules of equity prevailing in England are also required to modify these to suit local conditions. In saying this, I refer, of course, to s. 3(1) of the Civil Law Act 1956, and in particular, to the proviso to that subsection. Section 3(1) reads as follows:

3(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall

(a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956;

(b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December, 1951;

(c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th day of December, 1949, subject however to subsection (3)(ii);

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

The proper approach to be adopted in the application of rules of equity to our land law was stated by Syed Agil Barakbah SCJ in *Lian Keow Sdn. Bhd. (In Liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors*. [1988] 2 MLJ 449, at p. 463, as follows:

> The Torrens system as codified by the National Land Code 1965 deals with registration of land and provides simplicity and certitude in transfers of land. It is a system of conveyancing and provides indefeasibility of title to a registered owner of land against any rival claimants except in the case of fraud or similar misconduct as provided under s. 340(2) of the Code. It does not prevent or restrict the creation of beneficial interests in land by way of express, implied or resulting trust arising by operation of law in Malaysia by virtue of s. 3 of the Civil Law Act 1956. It does not abrogate the principles of equity but alters the application of particular rules of equity in so far as is necessary to achieve its special objects. In this way, the court is entitled to exercise jurisdiction in personam to insist upon proper conduct in accordance with equitable principles and norms (see *Wilkins & Ors v. Kannammal, & Ors* [1951] MLJ 99, 100; *Registrar of Titles, Johore v. Temenggong Securities Ltd* [1976] 2 MLJ 44, 45 and *Oh Hiam & Ors v. Tham Kong* [1980] 2 MLJ 159, 164-165).

> The exercise of jurisdiction in personam should be distinguished with the exercise of jurisdiction in rem. It is important to note that the doctrine of English equity does not apply with equal force to the system of registration of title to land contained in the Code. The distinction between registered and unregistered interest in land under the Code is different from that in the English law between legal estates and equitable interests in land. The Code restricts the kinds of interests in land which are capable of being registered, but at the same time it does not prevent or restrict the creation of beneficial interests in land by way of equitable trust. The position is made clear from some authorities on the matter.
>
> See also, *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 1 MLJ 719, at p 756.
>
> Our law of immovable property does not recognise the concept of an English legal mortgage. The form of security provided at law is a registered charge under the National Land Code 1965. But our courts have always recognised equitable interests in land, including an equitable mortgage created by the deposit of title deeds.

All these legal principles of law should be vigorously applied to the facts of the present case. Now, the relevant clauses and the salient documents that were referred to in the course of this judgment show that the parties intended that the loan was advanced upon an agreement by the borrower to create a legal mortgage just like the situation as envisaged by the Court of Appeal in *Philleoallied Bank (Malaysia) Bhd*'s case. It must be recalled that the first defendant never, at any time, disputed the terms of the letter of offer, the loan agreement and the substituted power of attorney which explicitly spelt out the parties' intention that the parent land would be charged to secure the repayment of the loan by the second defendant. That would be the irresistible inference to draw and arrive at for otherwise why should the first defendant surrender possession of the 1019 IDTs to the plaintiff. By way of an analogy, reference should be made to the case of *ARRM Arunasalam Chetty Son Of Sithambaram Chetty v. Teah Ah Poh Trading Under The Style Of Mun Seng Hin Kee & Ors* [1937] MLJ Rep 16, where Whitley Ag CJ (SS) aptly said at p. 18 of the report:

> With the greatest respect for the judge below I find myself unable to agree with the view which he took as to the intent to be inferred from the deposit of the Surat Kechil. It seems to me that the intention to create a security must have been present to the minds of the parties when the deposit was made and accordingly an equitable mortgage was created. The position of an equitable mortgagee by deposit, such as I hold the appellant to be, is shortly stated by Stevens J. in his judgment in *The Ho Hong Bank v. Chop Hock Chin Leong,* [1929] S.S.L.R. at page 202 as follows:

> He is allowed by Courts of equity to enforce his agreement and thereby acquire a title, or exercise those rights of foreclosure and sale, which are ordinarily incidental to a legal mortgage. But he has no title in the ordinary sense – he has in his possession the indicia of another's title, and it is precisely because he has no title that he is compelled to invoke the equitable jurisdiction of the Court to obtain his rights.

> It follows then that in my opinion the appellant is entitled to a declaration that he is an equitable chargee of the lands comprised in the Surat Kechil and, as his claim is thus brought under section 24 of the Limitation Enactment, it is not barred, and I would accordingly allow the appeal and set aside the orders in the Courts below.

The affidavit of Ng Chee Meng as seen in encl. 8 was quite damaging. Ng Chee Meng described himself as the director of the first defendant and so I can safely say that encl. 8 was the affidavit of the first defendant. In that affidavit, the first defendant deposed as follows (a brief translation of the essence of the averments translated into the English language):

> At paragraph 7
>
> ... the resolution dated 12.12.1996 was necessary in order to comply with the first defendant's obligations to the second defendant under the profit sharing agreement to enable the first defendant's lands to be used by the second defendant as security for the loans offered by the plaintiff ... .
>
> At paragraph 8
>
> I refer to paragraph 11 ... and admit that the first defendant consented to the assignment ... .

I have alluded to the letters dated 20 February 2002 and 3 April 2002 which were marked as exhs. "MBSB15 (a) – (b)" and "MBSB17 (a) – (c)" of encl. 3 where the first defendant never raised the issue in regard to the plaintiff's right to the charge nor did the first defendant ever demanded the return of the 1019 IDTs. The first defendant was not aggrieved at all when it lost possession of those land titles. One would have thought that to lose possession of one's land titles would cause grievance to the aggrieved party. This was not the case at all. So, applying the speech of Whitley, Ag CJ (SS) in *ARRM Arunasalam Chetty Son Of Sithambaram Chetty v. Teah Ah Poh Trading Under The Style Of Mun Seng Hin Kee & Ors (supra)*, the plaintiff in the present case was entitled to the declarations as sought for in encl. one (1). Shortly put, the plaintiff was certainly entitled to the registrable third party charges over the 1019 IDTs owned by the first defendant as security for the loans granted by the plaintiff to the second defendant. That would be my judgment and I so hold accordingly.

Incidentally, it is now trite (*Mastiara Sdn Bhd v. Motorcycle Industries (M) Sdn Bhd & Ors* [1998] 3 CLJ 874) that the court certainly has a discretion in deciding whether specific performance ought to be decreed. Section 21 of the Specific Relief Act 1950 (Revised 1974) is the relevant provision and it reads as follows:

Discretion of the Court

Discretion as to decreeing specific performance.

21.(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant any such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise a discretion not to decree specific performance:

(a) where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part; and

ILLUSTRATIONS

(a) A contracts to sell to B the interest of C in certain stock-in-trade. It is stipulated that the sale shall stand good, even though it should turn out that C's interest is worth nothing. In fact, the value of C's interest depends on the result of certain partnership-accounts, on which he is heavily in debt to his partners. This indebtedness is known to A, but not to B. Specific performance of the contract should be refused to A.

(b) A contracts to sell, and B contracts to buy, certain land. To protect the land from floods, it is necessary for its owner to maintain an expensive embankment. B does not know of this circumstances, and A conceals it from him. Specific performance of the contract should be refused to A.

(c) A's property is put up to auction. B requests C, A's attorney, to bid for him. C does this inadvertently and in good faith. The person present, seeing the vendor's attorney bidding, think that he is a mere puffer and cease to compete. The lot is knocked down to B at a low price. Specific performance of the contract should be refused to B.

(d) Where the performance of a contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

ILLUSTRATIONS

(a) A and B, trustees, join their beneficiary, C, in a contract to sell the trust-estate to D, and personally agree to exonerate the estate from heavy incumbrances to which it is subject. The purchase-money is not nearly enough to discharge those incumbrances, though, at the date of the contract, the vendors believed it to be sufficient. Specific performance of the contract should be refused to D.

(b) A contracts with B to sell him certain lands, and to make a road to it from a certain railway-station. It is found afterwards that A cannot make the road without exposing himself to litigation. Specific performance of the part of the contract relating to the road should be refused to B, even though it may be held that he is entitled to specific performance of the rest with compensation for loss of the road.

(c) A, a lessee of mines, contracts with B, his lessor, that at any time during the continuance of the lease B may give notice of his desire to take the machinery and plant used in and about the mines, and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to B.

(d) A contracts with B to buy from B's manufactory and not elsewhere all the goods of a certain class used by A in his trade. The court cannot compel B to supply the goods, but if he does not supply them A may be ruined, unless he is allowed to buy them elsewhere. Specific performance of the contract should be refused to B.

(3) A case in which the court may properly exercise a discretion to decree specific performance is where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

ILLUSTRATION

A sells land to a railway company, who contract to execute certain works for his convenience. The company take the land and use it for their railway. Specific performance of the contract to execute the works should be decreed in favour of A.

In regard to the issue of hardship, "self-induced" hardship would not avail to the party raising that argument (*Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd* [1989] 2 CLJ 142 SC; and *Toh Tiong Huat v. PM Gunasaykaran (Personal representative of the estate of Mayandi s/o Sinnathevar, deceased)* [1996] 1 SLR 384). The court in *Narayanan Chettiar s/o Raman Chettiar v. Samuel Jivamoney Dass s/o Chelliah* [1986] 1 CLJ 579 held that where an order for specific performance would breach the principles of natural justice, then

damages would be the more appropriate remedy and the principle of this case cannot apply to the facts of the present case at hand.

The facts have shown that the plaintiff has performed its part of the bargain. The plaintiff has disbursed the term loan of RM20 million. That cannot be denied and that had happened. I have no hesitation to order specific performance and grant the declarations as sought for by the plaintiff.

Declaration is always known as a flexible remedy. It suits all sorts of situations. It is said to apply to a "wide range of circumstances" and to a "wide variety of cases in terms of subject-matter" (per Raja Azlan Shah Ag LP in *Dato' Menteri Othman bin Baginda v. Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, 31). Section 41 of the Specific Relief Act 1950 (Revised 1974) makes provisions for a declaratory decree and it must be read with O. 15 r. 16 of the Rules of the High Court 1980 ("RHC"). Briefly, under s. 41 of the Specific Relief Act 1950 (Revised 1974), a declaration may be sought as to the plaintiff's entitlement to a legal character, or status or even to the right to property. Whereas under O. 15 r. 16 of the RHC, to succeed, the plaintiff needs only to establish that his legal interests are peculiarly affected. The plaintiff here has certainly succeeded in showing that its "legal interests are peculiarly affected". So, I say that a declaratory judgment merely states some existing legal situation. And there must be in existence a legal issue between the parties thereto.

I would, for the above reasons, answer the first issue in favour of the plaintiff.

The Second Issue

It must be recalled that the substituted power of attorney dated 16 April 1997 was a deed of assignment with a power of attorney. Clause 4.1 of the substituted power of attorney is in reality a delegation of the second defendant's power to the plaintiff limited to executing documentation. I will now reproduce cl. 4.1(a), cl. 4.1(b) and cl. 4.1(c) of the substituted power of attorney in quick succession (see exh. "MBSB10" of encl. 3):

4.1 POWER OF ATTORNEY

(a) PINTAS by way of security hereby irrevocably appoints MBSB and the persons deriving title under it and separately any Receiver and/or Manager appointed hereunder severally to be its attorney in its name and on its behalf and as its act and deed or otherwise to execute and complete in favour of MBSB or its nominee or of any purchaser any documents which MBSB may require for perfecting its title to or for vesting all properties and assets both present and future in MBSB or its nominees or in any purchaser and otherwise generally to sign seal deliver and otherwise perfect any transfer and/or such legal or other

mortgage charge or assignment and all such deeds assurances agreement and documents and to receive and collect all documents including the sub-divided documents of title of the said Land and to do all such acts and things as may be required for the full exercise of all or any of the powers hereby conferred or which may be deemed expedient by MBSB or the Receiver and/or Manager on or in connection with any sale lease disposition realisation or getting in by MBSB or any such Receiver and/or Manager of the said properties and assets or any part thereof or in (connection) with any other exercise of any power hereunder.

(b) PINTAS hereby covenants with MBSB and separately with any such Receiver and/or Manager that on request it will ratify and confirm all additional security agreements documents acts and things and all transactions entered into by MBSB or such Receiver and/or Manager or by PINTAS at the instance of MBSB or such Receiver and/or Manager in the exercise or purported exercise of its or his power and PINTAS irrevocably acknowledges and agrees that such power of attorney is inter alia to secure the performance of the obligations owed to MBSB and any such Receiver and/or Manager by PINTAS.

(c) PINTAS hereby further declares that the powers and authorities conferred hereunder are given for valuable consideration and shall remain irrevocable until payment and discharge of the Loan, interest thereon and other moneys payable hereunder.

And it must be read with cl. (k) of the first power of attorney which had been reproduced earlier and when so read it can be surmised that the first defendant had appointed the plaintiff as its substituted Attorney limited to those matters as listed in cls. 4.1(a), 4.1(b) and 4.1(c) of the substituted power of attorney. As I said earlier and I must reiterate that the power to execute the charges was clearly within the ambit and purview of the substituted power of attorney. This was, at any rate, never denied by the first defendant at all.

Reverting back to the affidavit of Ng Chee Meng in encl. 8, there was an unequivocal admission in regard to the ambit and purport of the first power of attorney. Ng Chee Meng deposed as follows (a brief translation of the essence of the averments translated into the English language):

At paragraph 3

That the First Power Of Attorney was given by the first defendant to the second defendant.

At paragraph 5

That the first power of attorney was given to the second defendant by the first defendant for valuable consideration.

I must reiterate that the first defendant never disputed the fact that the term loan of RM20 million was released by the plaintiff. The first defendant merely disputed the purpose or the usage of the term loan. It must be emphasised that the first defendant never raised the fact nor alleged that the second defendant had acted *ultra vires* the first power of attorney in executing the deed of assignment. In fact, the first defendant had duly acknowledged and consented to the same (see p. 10 of exh. "MBSB10" of encl. 3 and para. 8 of Ng Chee Meng's affidavit in encl. 8). The first defendant too did not, at any time, allege that the execution of the charges by the plaintiff would not be covered nor fall within the ambit of the powers conferred in and by the substituted power of attorney. The first defendant merely alleged that the substituted power of attorney cannot be exercised once the profit sharing agreement has been terminated. The first defendant as seen in its letter dated 3 April 2002 as reflected in exh. "MBSB17(a)" of encl. 3 maintained that the plaintiff was no longer authorised to use the substituted power of attorney to execute the charges not because it was *ultra vires* the said power but rather because the profit sharing agreement has been terminated. One thing was certain. It was never disputed that the first power of attorney was not given for valuable consideration. Now, in the absence of the allegation that the intended act by the plaintiff to create charges over the 1019 IDTs was *ultra vires* the power of attorney, there cannot be a unilateral revocation of the first power of attorney because it was granted for valuable consideration.

In regard to the law, I have this to say. All the common law cases refer to the term "power of attorney" coupled with an interest and that such a power is irrevocable while the interest still subsists. The learned author in the person of Trevor M Aldridge wrote a book entitled "Powers of Attorney", seventh edition, and at p. 59 he had this to say:

> 5 Irrevocable powers
>
> (a) At common law
>
> A power of attorney coupled with an interest is irrevocable at common law while that interest subsists (*Walsh v. Whitcomb* [1797] 2 Esp 565). This applies, eg, to a power given to a creditor to sell land and to retain the proceeds to repay himself (*Gaussen v. Morton* [1830] 10 B&C 731). A power linked to a mortgage remains irrevocable until the money has been repaid (*Barclays Bank Ltd v. Bird* [1954] Ch 274).

I gratefully adopt these passages and I will now examine the cases cited therein.

In *Walsh v. Whitcomb* [1797] 2 Esp 565, the court there held that where a power of attorney was given as part of a security, it was not revocable. That

was a case of an action of assumpsit for work and labour, goods sold and delivered. The action was brought to recover a sum of money for work done by the plaintiff, who was a tailor. The defence was, that Walsh the plaintiff, in the month of October 1794, having become insolvent, had executed a power of attorney to one Barker, together with a general assignment by deed, authorising him to receive the several debts due to him for the benefit of his creditors, and to give proper receipts and discharges for the same: and that he had also given Barker a power to appoint a substitute or other person to act in his room for the same purposes. In October 1795, Barker, in pursuance of the power of substitution so given, executed an authority to one Charles Hindley. The latter applied to the defendant Whitcomb for the debt due to Walsh, he paid it and took his receipt. Some time later, Whitcomb was again approached for payment of the same demand, by another person claiming under a power of attorney from Walsh, the plaintiff. The defendant Whitcomb produced the receipt he had received from Hindley, which the person who applied refused to allow; and so the present action was brought. It was contended for the plaintiff that the power of attorney was, from its very nature, revocable, and that the execution of the subsequent power of attorney was a revocation of the former. Lord Kenyon delivering the judgment of the court, aptly said, in a short judgment, that (see p. 457 of the report):

> There is a difference in cases of powers of attorney: in general they are revocable from their nature; but there are these exceptions. Where a power of attorney is part of a security for money, there it is not revocable: where a power of attorney was made to levy fine, as part of a security, it was held not to be revocable; the principle is applicable to every case where a power of attorney is necessary to effectuate any security; such is not revocable. In the present case Walsh assigned all his effects, &c. over to Barker, to whom, amongst others, he was indebted: the power of attorney was made to Barker to call in the debts for the benefit of the creditors; it was part of the security for the payment of the creditors. It was therefore by law not revocable; and the payment by the defendant is good.
>
> The jury found a verdict for the defendant.

In *Gaussen & Other v. W Morton And E Morton* [1830] 10 B & C 732, at p. 622, the facts may be stated as follows. A. being indebted to B., and in order to discharge the debt executed to B. a power of attorney authorising him to sell certain lands belonging to him, A. It was held that this, being an authority coupled with an interest, could not be revoked.

The case of *Barclays Bank LD v. Bird* [1954] Ch 274, was also a case on the issue of the revocability of a power of attorney. There, a mortgagor created an equitable charge over a dwelling-house by a document under seal, which

contained a clause whereby the mortgagor gave an irrevocable power of attorney to the mortgagee to execute a legal mortgage. At the time of the creation of the equitable charge, the mortgagor was living with his wife in the mortgaged property, the matrimonial home. Subsequently, the mortgagor deserted his wife, whereupon she obtained an order under s. 17 of the Married Women's Property Act 1882, allowing her to reside in the house. The order forbade the mortgagor, without leave of the court, from taking any step whatsoever which would interfere with the wife's residence in the house. Subsequently, the mortgagor was adjudicated bankrupt, whereupon the mortgagee, by virtue of the power of attorney, executed a legal charge on the property and thereafter claimed possession. The wife resisted the mortgagee's claim to possession on the grounds of (a) that at the date of desertion the mortgagee had only an equitable charge and not a legal charge over the property; and (b) that the exercise of the power of attorney by the execution of the legal charge was an infraction of the terms of the order. The court held that any equity which the wife might have by virtue of her right to remain in the matrimonial home after desertion by her husband was an equity which arose at a time subsequent to the equity vested in the mortgagee by virtue of the equitable charge, and that accordingly it ranked after it. The court also held that for the purpose of seeking possession from the court under the terms of a mortgage, an equitable mortgagee was in precisely the same position as a legal mortgagee, and that accordingly, *Lloyds Bank v. Trustee of the Property of O., a Bankrupt* [1953] 1 WLR 1460, [1953] 2 All ER 1443 applied. Finally, the court held that the exercise of the power of attorney by the mortgagee was not an infraction of the terms of the order, for the mortgagee had an absolute right to execute that power, and the order restraining the donor of the power could not without notice affect its exercise by the donee. Harman J, in his judgment said (see p. 281 to p. 282 of the report):

> As to the second point, namely, that the exercise of the rights under the power of attorney was in some way an infraction of the order under the Married Women's Property Act, 1882, I cannot take that view at all. The bank had an absolute right to do what it did, and an order made restraining the donor of the power of attorney from creating rights could not, in my judgment, without notice affect the donee in any way.
>
> That view is supported by *Tingley v. Muller* [1917] 2 Ch 144, 22 TLR 269. The point there, as shortly stated in the headnote, was this: 'An irrevocable power of attorney to sell land and give receipts for the purchase-money is not avoided by the donor of the power subsequently becoming an alien enemy.' That decision, therefore, is only analogous to the present; but Warrington L.J. made a general observation in his judgment which I find helpful Ibid. 165. Again, a recognised mode of dealing with land is through an attorney acting under a power of attorney. If such a power is made irrevocable, as is the

case with that of May 20, 1915 – and the present power – then, in favour of a purchaser, not only can it not be revoked in the ordinary sense, but any act done by the donee within the limits of the authority conferred by the power will be as valid as if anything done by the donor of the power without the concurrence of the donee had not been done. There follows a reference to section 9 of the Conveyancing Act, 1882, which has been repeated totidem verbis by section 127 of the Law of Property Act, 1925. The attorney under such a power is not like an ordinary agent. As between him and a purchaser he is, so long as he does not exceed his authority, absolutely independent of the principal. He has no occasion to consult or confer with him, and he need pay no attention to any directions he may give. The attorney, in fact, when dealing with a purchaser is exclusively clothed with all the capacities of the principal in reference to the subject-matter. He was considering in that passage the position of a purchaser; but it seems to me that the passage dealing with the quality and nature of a power of attorney of this sort is in every way applicable to the present case. Accordingly, in my judgment, the creation of the legal charge, which was merely a piece of machinery designed no doubt to enable the bank conveniently to make a title for sale, is not something which I should frown upon as being an infraction of the order of the Queen's Bench Division. In fact, I rest my decision on this, that the equitable mortgagee under a document of this sort is in precisely as good a position as under a legal mortgage when it comes to asking for possession from the court, and it makes no difference – and it is no valid distinction between *Lloyds Bank v. O.'s Trustee* [1953] 1 W.L.R. 1460, and the present case – that at the date of the desertion the mortgage was equitable and not legal. It seems to me, therefore, that the mortgagee as of right ought to have an order for possession.

It was suggested to me that, if that were so, it was a case in which a long interval, or at least a time longer than the usual interval, ought to be given before the order takes effect, to enable the wife to find other accommodation. I was referred to *Vaughan v. Vaughan* [1953] 1 Q.B. 762; [1953] 1 W.L.R. 236; [1953] 1 All E.R. 209 on that point. That was a case between husband and wife. This is a case between mortgagee and mortgagor, therefore, those considerations do not apply. If I were to vary the order it would only be, in my judgment, a case of 'hard cases making bad law', and I do not propose in this instance to give way to my natural feelings of sympathy for the wife and children, but to make the ordinary order, which is that possession shall be given 28 days after the service of the order. No doubt the bank may prove more sympathetic than any court feels that it is entitled to be. There will be an order for possession in the common form.

In regard to the power of attorney that was given for valuable consideration, reference to s. 6 of the Powers of Attorney Act, 1949 (Act 424) should be made. That section enacts that:

6. Powers of attorney given for valuable consideration.

(1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser:

(a) the power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power; and

(b) any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(c) neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power.

(2) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

And it seemed to me that the dicta in the case of *Tingley v. Muller* [1917] 2 Ch 144, 22 TLR 269 as alluded to by Harman J in B*arclays Bank LD. v. Bird (supra)* was given its statutory form in our country by way of s. 6 of the Powers Of Attorney Act, 1949 (Act 424).

In regard to an Attorney acting on a revoked power, my attention was drawn to the case of *Muthusamy v. Subramaniam* [1965] 2 MLJ 273, where Winslow J said at p. 274 of the report:

> I was referred to a proposition at page 177 of 'Powers of Attorney' by F. Bower Alcock which reads:
>
> > A power has been described as being coupled with an interest 'where an agreement is entered into on a sufficient consideration whereby an authority is given for the purpose of securing some benefit to the donee of the authority'; such powers cannot be expressly revoked or countermanded, so long as the consideration subsists.
>
> It was accordingly contended that the power in the present case was coupled with an interest and that, therefore, it could not be revoked. While I accept the proposition cited from Alcock, I am not satisfied, however, that the power in the present case is, in fact, coupled with an interest. There is nothing in the power which refers to any consideration for which it was given or even

> to the agreement for the sale of the business and nowhere does it state that the power is to be irrevocable. The power must therefore, be regarded as a naked power which can be expressly revoked as was done in this case (see *Frith v. Frith* [1906] A.C. 254).

But, with respect, the case of *Muthusamy v. Subramaniam (supra)* cannot be equated to the facts of the present case. Although the first defendant here had admitted in para. 5 of encl. 8 that the first power of attorney was given for valuable consideration, it must not be forgotten that the second defendant had agreed to bear the burden of being the plaintiff's borrower in order to finance the development costs of the development project on the parent land. And that regardless of whatever allegation the first defendant may raise in respect of the real purpose of the term loan, the second defendant's liability pursuant to the loan agreement must still be effective and be held to be so. This is the "detriment" which the second defendant had undertaken in return for the power of attorney to be granted by the first defendant. In law, this would be considered to be a good and valuable consideration. The basic feature of the requirement of consideration lies in the idea of reciprocity in that "something of value in the eye of the law" (*Thomas v. Thomas* [1842] 2 QB 851 at 859) must be given for a promise in order to make it enforceable as a contract. It must be borne in mind that an informal gratuitous promise does not amount to a contract (*Re Hudson* [1885] 54 LJ Ch 811; *Re Cory* [1912] 29 TLR 18; and *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd* [1991] 1 QB 1 at 19). The traditional definition of the doctrine of consideration tends to revolve on the ideas of benefit and detriment. A classic example would be the case of *Currie v. Misa* [1875] LR 10 Ex 153, where Lush J stated at p. 162:

> A valuable consideration, in the eyes of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other.

Now, in the context of the present case, the first defendant had admitted that the first power of attorney was given for valuable consideration. At p. 3 of the first power of attorney, the following passage appears:

> AND it is hereby declared that this Power Of Attorney is given for valuable consideration and shall be irrevocable.

That would, to my mind, puts an end to any speculation that the First Power Of Attorney was revocable. In fact, it was entirely irrevocable. I would, accordingly, answer the second issue in the negative.

The Third Issue

Was the plaintiff obliged to perform all the obligations of the second defendant under the profit sharing agreement that was entered between the first and the

second defendants dated 15 August 1996 and pursuant to the substituted power of attorney dated 16 April 1997? Or put it in another way, whether the burden, obligation and duties pursuant to the profit sharing agreement would have been shifted to the plaintiff pursuant to the substituted power of attorney? I would venture to answer the third issue in the negative.

Clause 2.1 of the substituted power of attorney which has been reproduced earlier, clearly stipulates that the second defendant "HEREBY ABSOLUTELY ASSIGNS to the plaintiff as security for the Loan all its entire rights title and interest in and under the profit sharing agreement and all stipulations therein contained and all remedies for enforcing the same and all its rights, title and interest in respect of the said land which the plaintiff hereby accepts ... ." But it doesn't say that the burden of the contract would be shifted to the shoulders of the plaintiff, so to speak. If authority is required for this proposition then the case of *Associated Portland Cement Manufacturers [1900], Lim, and Imperial Portland Cement Co. v. Tolhurst/Tolhurst v. Associated Portland Cement Manufacturers (1900), Lim* [1902] KBD 949, a decision of the Court Of Appeal with a coram of Collins MR, Sir F Jeune, Cozens-Hardy LJ, would be an ideal choice. There, writing a separate judgment, Collins MR observed at p. 956:

> It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor onto those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of his obligation to some one else: this can only be brought about by the consent of all three, and involves the release of the original debtor – see *Liversidge v. Broadbelt* [1859] 28 L.J. Ex. 332; 4 H. & N. 603 and cases collected in the notes to *Lampleigh v. Brathwait* 1 Sm. L.C. (ed. 10), p. 136.

And this very case was referred to by our Supreme Court in the case of *Housing And Development Board v. Lee Sem Yoong Sdn Bhd* [1987] 2 MLJ 204.

It must be borne in mind that the substituted power of attorney serves as a security "to secure" ... the "payment and discharge of the loan, interest thereon and other moneys payable hereunder" (see cl. 4.1(b) of the substituted power of attorney read together with cl. 4.1(c) of the same). It was crystal clear that the plaintiff was never meant to receive any benefit arising from and under the profit sharing agreement. There cannot be an assignment of the burden and obligation to the plaintiff at all. That would be the correct interpretation of the substituted power of attorney. In *Hoo See Sen & Anor v. Public Bank Bhd. & Anor* [1988] 2 MLJ 170, Salleh Abas LP speaking for the then Supreme Court had occasion to interpret the deed of assignment in that case in these words (see p. 172 of the report):

We also observe that clause 4 of the deed of assignment clearly spells out what has been assigned and what has not been assigned. For the sake of clarity, we set out below the wording of this clause, which is as follows:

> 4. For the consideration aforesaid the borrowers as beneficial owners hereby absolutely assign to the bank the said property and the full and entire benefit of the sale agreement together with all rights title and interests of the borrowers therein. Provided always that notwithstanding the assignment hereinbefore contained or any other provision of this agreement the borrowers shall and hereby undertake to continue to observe perform and be bound by all whatsoever conditions covenants and stipulations therein on the part of the borrowers expressed and contained in the sale agreement.

It is clear from this clause that the appellants assigned to the first respondent only the rights regarding the property and the appellants' rights under the sale and purchase agreement. Because of this, the appellants are still bound and continued to be bound to observe and perform all the duties and liabilities under the sale and purchase agreement. Payment of the balance of the purchase price, which is purportedly due from the appellants, is such liability, which is not the liability of the first respondent, but the liability of the appellants. Thus, under no circumstances was the first respondent bound or even authorised to make such payment and indeed the position of the first respondent in the matter of disbursing the loan is in the capacity of an agent to the appellants. The first respondent is holding the loan sum on behalf of the appellants and is bound to release the money only when authorised to do so, and this must be for the benefit of the appellants.

Likewise here, the second defendant was never released from the performance of the obligations stipulated in the profit sharing agreement. It was not the intention of the parties that the plaintiff could at any time alternate with the second defendant in carrying out the development project on the parent land. It was once suggested by the second defendant that "the conversion of MBSB's loan into equity participation in the above project" as proposal for settlement of the debt owed to the plaintiff (see exh. "NCM1" annexed to the first defendant's first affidavit in reply – encl. 8). That proposal by the second defendant to the plaintiff to settle the debt in that way was due to the "present economic downturn and the extremely difficult property market" – the very words employed by the second defendant in its letter dated 10 August 1998 as seen in "NCM1" of encl. 8. It seemed that this proposal came after the second defendant received the letter of demand from the plaintiff's then solicitors M/s TK Lim & Co, dated 23 July 1998 as seen in exh. "MBSB14 (a) – (b)" of encl. 3. The letter of demand was sent to the second defendant due to the failure on the part of the second defendant to service the monthly instalment payments for the term loan. It was not the intention of the parties under the substituted power of attorney that the plaintiff would double up as the "standby developer"

for and on behalf of the second defendant. In my judgment, the plaintiff cannot be made liable or responsible for the development project on the parent land.

The Fourth Issue

It was the first defendant's contention that the negotiations conducted between the plaintiff and the second defendant had resulted in a compromise and settlement based on the terms as set out in the plaintiff's letter dated 17 May 2001 to the second defendant as seen in exh. "NCM10" of encl. 8. That was an open letter and it was worded in this way:

> PROPOSED DEVELOPMENT OF TAMAN BUKIT INDAH ON LOT NOS. 1229 AND 1230, MUKIM OF PANTAI TIMUR, DISTRICT OF KOTA TINGGI, JOHOR DARUL TAKZIM
>
> TERM LOAN OF RM20.0 MILLION BRIDGING LOAN OF RM50.0 MILLION
>
> We refer to your letter dated 20 April 2001 and we would inform that upon due consideration, Malaysia Building Society Bhd ('MBSB') is agreeable to the following:
>
> 1.0 The Project Land be transferred to MBSB or its nominee free from all encumbrances whatsoever and with vacant possession as full and final settlement of the entire debt due and owing by Pintas Mewah Sdn Bhd ('Pintas') to MBSB together with interest accruing thereon.
>
> 2.0 The fees and disbursements to be incurred in connection with the transfer of the Project Land be equally borne by Pintas and MBSB.
>
> 3.0 Pintas is required to settle all legal fees and disbursements incurred in connection with the institution of legal proceedings by MBSB against Pintas and its loan guarantors for the recovery of the balance owing to MBSB. In this respect, the appointed solicitors, Messrs T.K. Lim & Co. will be instructed to forward the bill direct to Pintas for settlement in due course.
>
> Pintas is hereby given seven (7) days from the date of this letter to accept the above proposal, failing which, MBSB shall expedite foreclosure proceedings against the Project Land and enforce the directors and corporate guarantees to recover all amount owing.

The second defendant was given seven days to accept the terms of the settlement. The second defendant did accept those terms by an open letter dated 22 May 2001 addressed to the plaintiff as seen in exh. "NCM11" of encl. 8 and that letter of acceptance was worded in these words:

PROPOSED DEVELOPMENT OF TAMAN BUKIT INDAH ON LOT NOS. 1229 AND 1230, MUKIM OF PANTAI TIMUR, DISTRICT OF KOTA TINGGI, JOHOR DARUL TAKZIM,

TERM LOAN OF RM20.0 MILLION BRIDGING LOAN OF RM 50.0 MILLION

Thank you for your letter [RU/LKM/PMSB-055/01(SAB)] dated 17 May 2001.

We confirm our acceptance of your proposal in respect of the settlement arrangement for the above as stated in your said letter.

Thank you.

The stand of the plaintiff was to this effect. That all the correspondences between the parties as seen in exhs. "NCM3" until "NCM15" of encl. 8 were privileged because they were all communications on a "without prejudice basis". The plaintiff also asserted that all the exhibits and the statements that were made were in fact made in the course of negotiations and in the spirit of attempting a settlement. The attempt at settlement failed. Once failed, the maker should not be held accountable for any statement made. The statements were said to be privileged.

It was also the stand of the plaintiff that there was never a settlement being achieved and, alternatively, even if there was such a settlement, that settlement had been overtaken by the counter-proposals. The terms of the counter-proposals had put an end to the original terms. It was even submitted that the counter-proposals had "killed", so to speak, the original terms.

It must be recalled that the second defendant has defaulted in the monthly instalment payments in respect of the term loan since May 1998 and the plaintiff had issued letters of demand dated 23 July 1998 and 8 March 1999 through its solicitors M/s. TK Lim & Co as seen in exh. "MBSB14 (a) – (b)" of encl. 3. Thereafter, the plaintiff and the second defendant had embarked on a series of correspondences on various proposals for settlement. At all material times, the plaintiff had been very careful. The plaintiff took extra pains to ensure that the negotiations proceeded on a without prejudice basis and had, on many occasions, reserved its rights and entitlement to legal action in order to recover all the amounts owing. In the majority of the plaintiff's correspondences, the plaintiff had used the without prejudice labels. Thus, in the plaintiff's letter dated 26 April 2000 addressed to the second defendant, the plaintiff had used the "without prejudice" label (see exh. "NCM3" of encl. 8) in bold letters. Again, in its letter dated 24 October 2000 as seen in exh. "NCM4" of encl. 8, the plaintiff had used the "without prejudice" label when corresponding with the second defendant . Now, in the letter marked as exh. "NCM4" of encl. 8,

the plaintiff was very cautious and in its last paragraph the plaintiff categorically stated by way of a disclaimer:

> We place on record that whatsoever settlement proposals and negotiations regarding the same will be entirely without prejudice to the legal rights which Malaysia Building Society Berhad ('MBSB') as the Lender/Chargee have against Pintas as the Borrower/Chargor. Further, this letter shall not be construed as any forbearance or waiver on MBSB's part to commence/continue with legal proceedings against Pintas so long as Pintas is in default of its contractual obligations to MBSB.

Even the open letter emanating from the plaintiff to the second defendant dated 5 April 2001 as seen in exh. "NCM8" of encl. 8 bore a similar disclaimer to the following effect, at its last paragraph:

> We place on record that whatever settlement proposal and negotiation regarding the same will be entirely without prejudice to the legal rights which MBSB as the Lender/Chargee have against Pintas as the Borrower/Chargor respectively. Further, this letter shall not be construed as any forbearance or (Jomis's) waiver on MBSB's part to commence/continue with legal proceedings against Pintas/Jomis so long as Pintas/Jomis in default of (their) contractual obligation(s) to MBSB.

By way of an explanation, the abbreviation of "Jomis" would refer to the first defendant while the abbreviation of "Pintas" would be in reference to the second defendant. While the abbreviation of "MBSB" would refer to the plaintiff.

As I said, the settlement did not materialise. By letter dated 26 September 2001, the plaintiff through its solicitors M/s Raja Eleena Siew Ang & Associates sent the following notice to the second defendant as seen at exh. "NCM16" of encl. 8 and it was worded as follows:

> We are instructed to inform you that our clients are not agreeable to your contra proposals therein set out. We are further instructed by our clients to give you notice which we hereby do to terminate all negotiations for a settlement of the above matter with immediate effect and our clients shall forthwith be at liberty to commence and/or to continue and enforce or exhaust all legal remedies available to them under the Facility Agreements, Charge, Guarantees and Debenture (`the Security Documents') to recover all monies due and owing to our clients under the aforesaid Security Documents without any further reference to you.

It was submitted on behalf of the plaintiff that even if there is an absence of the "without prejudice" label and the similar disclaimer paragraphs as alluded to earlier, it cannot be made an excuse so as to exclude it from the "without prejudice" privilege. It was strenuously submitted on behalf of the plaintiff that if one were to reply to a proposal for settlement which is written on a without

prejudice basis, surely the reply thereto would attract the same protection. These were indeed interesting submissions.

Chang Min Tat FJ speaking for the Federal Court in *Malayan Banking Bhd v. Foo See Moi* [1981] 2 MLJ 17, aptly explained the "without prejudice" rule in these salient words (see p. 18 of the report):

> It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement.

Proceeding further, somewhat with vigour and vitality, the plaintiff referred to O. 41 r. 6 of the RHC and sought to expunge paras. 14 to 23 of encl. 8 as well as exhibits marked as "NCM3" until "NCM15" of encl. 8 and for this purpose the decision of *Oh Kuang Liang v. Associated Wood Ind. Sdn Bhd* [1995] 2 AMR 1872 was relied upon. In that case, I had said (see the headnotes to the case at p. 1872 to p. 1873):

> The 'without prejudice' rule is founded on the public policy of encouraging litigants to settle their differences without resorting to litigation, and governs the control of the trial in relation to the admissibility of evidence.
>
> Therefore all negotiations aimed at settlements, whether oral or written, are excluded from being given in evidence. The competing interest of the public in promoting settlements, and interest in full discovery between parties to litigation, must be balanced.
>
> The case law indicates that the 'without prejudice' rule comes into play when settlement negotiations have failed; discovery does not arise in such cases.
>
> When seeking compromise or settlement, the protection given to parties to speak freely on all issues in the litigation, whether factual or legal, and to admit certain facts, should not be whittled down by the exceptions stated in certain case law.
>
> Therefore, letters written without prejudice are inadmissible to prove negotiations which were attempted. If the compromise fails, the maker should not be held accountable, and the facts which were admitted to achieve compromise, should not be admissible in evidence. However, if the negotiations lead to a settlement, the 'without prejudice' letters become admissible of the terms of the agreement, unless the agreement is incorporated in another document, which would evidence the agreement.

Even the House of Lords has made it clear in *Rush & Tompkins Ltd. v. Greater London Council* [1989] 1 AC 1280 that genuine negotiations with a view to settlement are protected from disclosure whether or not the "without prejudice" label has been expressly applied to the negotiations. At p. 1299, Lord Griffiths, in style, explained it in this way:

> The ('without prejudice') rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission.

This statement of the law puts to rest any speculation that the failure to use the "without prejudice" label would mean that the party making the offer to settle intends the offer to be open.

So the question to pose would be this: was there a concluded deed of settlement arising from the correspondences exchanged? I would answer this question in the negative. There was no concluded formalised deed of settlement. All negotiations were still preliminary in nature and they were subject to the execution of the formal deed of settlement. If I am wrong and that there was a settlement agreement by virtue of the two letters dated 17 May 2001 and 22 May 2001 respectively (see exhs "NCM10" and "NCM11" of encl. 8), yet I venture to say that these two letters were destroyed by the defendant's "counter-proposals" *vide* by its letter dated 28 August 2001 (see exh. "NCM14" of encl. 8). Alternatively, I hold that the terms allegedly concluded by virtue of these two letters were entirely in the realm of uncertainty.

Exhibit "NCM12" of encl. 8 was one set of the draft deed of settlement and this was forwarded to the second defendant on 26 June 2001. By way of a letter from the plaintiff's then solicitors M/s Raja Eleena Siew Ang & Associates dated 3 September 2001 as seen in exh. "NCM15" of encl. 8, the second draft of the deed of settlement was forwarded to the second defendant who was given a deadline of 14 days to reply with the relevant comments failing which the settlement exercise would be aborted. Incidentally, a few days before the letter dated 3 September 2001 as alluded to above, the second defendant took the liberty of writing directly to the plaintiff instead of to the plaintiff's then solicitors suggesting the change of parties in the proposed deed of assignment. That letter can be seen in exh. "NCM14" of encl. 8. The second defendant played possum and did not reply to the plaintiff's then solicitors'

letter of 3 September 2001 within the 14 days time frame. By letter dated 26 September 2001 as per exh. "NCM16" of encl. 8, the plaintiff's then solicitors replied to the second defendant's letter dated 28 August 2001 as seen in exh. "NCM14" of encl. 8 and that reply terminated all negotiations for settlement with immediate effect. It is germane to mention that the first and the second defendants did not protest against the said termination. The plaintiff then instructed its solicitors M/s Nik Hussain & Partners to issue a letter of demand to the second defendant as reflected in exh. "MBSB14(c)" of encl. 3. There was not even a protest to the demand for the amount owing if indeed there was such a deed of settlement. Now, the allegation that there was in existence a deed of settlement was raised for the very first time in the first defendant's affidavit in encl. 8. This clearly showed that it was a mere afterthought on the part of the first defendant.

Another point worthy to note would be this. That all the exhibits in "NCM3" right up to "NCM15" of encl. 8 were written by the second defendant notwithstanding the fact that the first defendant would also be a party to the purported deed of settlement. Furthermore, the proposed terms of the deed of settlement would entail the plaintiff creating a nominee company in order to purchase the parent land from the first defendant. It seemed to me that there were other parties that were involved and yet their identities cannot be readily ascertained by merely referring to the letters in exhs. "NCM10" and "NCM11" of encl. 8. It seemed to me that there were more detailed terms that have yet to be finalised. Certain pertinent questions need to be posed:

(1) If there was indeed a compromise in the amount claimed, what was the exact amount?

(2) How much was the parent land that was to be developed valued at?

(3) Should there not be a completion date?

(4) Wasn't there a time frame for all the necessary terms and conditions to be complied with?

(5) Bearing in mind that the amount outstanding was large and if there was a delay in finalising the terms of the execution, would the plaintiff be still interested and be bound to perform the settlement agreement?; and surely there must be a cut-off date?

(6) What would happen, if for some reason the parent land cannot be transferred to the yet to be named and created nominee?

These pertinent questions should have been foreseen and provisions should have been made for it. Now, in a normal sale and purchase agreement all these terms would be essential and would be provided for. I would have thought that a transaction of such a magnitude involving two corporations should have incorporated detailed and refined terms in the deed of settlement. Now, in the context of the present case, minor amendments to the second draft of the deed of settlement were only made by the plaintiff and this would clearly suggest that negotiations were still ongoing and they were at the preliminary stage. If one were to examine the letter from the second defendant to the plaintiff dated 28 August 2001 as seen in exh. "NCM14" of encl. 8, it would be apparent that negotiations were still being conducted and that the terms have not been finalised. In my judgment, until and after the terms have been finalised and those terms are reduced in writing and agreed to by the parties, there cannot be a concluded settlement agreement. The current situation was indicative of an ongoing negotiation (*Kam Mah Theatre Sdn. Bhd. v. Tan Lay Soon* [1994] 1 CLJ 1, SC).

Reverting back to the argument that even if there existed a deed of settlement it has been destroyed by the counter-proposals, I have this to say. Now, the change of the parties as suggested by the second defendant in exh. "NCM16" of encl. 8 was not a minor amendment. It was not a matter of merely making an amendment and an adjustment to the draft settlement agreements. It was more in the nature of a counter-proposal. It was a fresh offer with an entirely new terms and this was rejected by the plaintiff. The English Court of Appeal in the case of *Butler Machine Tool Co Ltd v. Ex-Cell-O Corporation (England) Ltd* [1979] 1 All ER 965, had occasion to consider the principle of what would amount to a counter proposal and the consequences thereto. Lord Denning MR writing a separate judgment for the Court of Appeal aptly said at p. 967 to p. 968 of the report:

> If those documents are analysed in our traditional method, the result would seem to me to be this: the quotation of 23rd May 1969 was an offer by the sellers to the buyers containing the terms and conditions on the back. The order of 27th May 1969 purported to be an acceptance of that offer in that it was for the same machine at the same price, but it contained such additions as to cost of installation, date of delivery and so forth, that it was in law a rejection of the offer and constituted a counter-offer. That is clear from *Hyde v. Wrench* [1840] 3 Beav 334. As Megaw J said in *Trollope & Colls Ltd v. Atomic Power Constructions Ltd* [1962] 3 All ER 1035 at 1038, [1963] 1 WLR 333 at 337: '… the counter-offer kills the original offer'. The letter of the sellers of 5th June 1969 was an acceptance of that counter-offer, as is

shown by the acknowledgment which the sellers signed and returned to the buyers. The reference to the quotation of 23rd May 1969 referred only to the price and identity of the machine.

And the Court of Appeal in the *Butler Machine*'s case had gone on to find that based on the conduct and the documents executed subsequent to the counter proposal there was, in fact, a concluded contract based on the counter-proposed terms. But, in the context of the present case, the plaintiff has in no uncertain terms rejected the proposals of the second defendant as set out in its letter dated 28 August 2001 and as reflected in exh. "NCM-14" of encl. 8. So, there was therefore no question as to whether there existed any agreements based on the counter-proposed terms. I must, for these reasons, conclude that the reliance by the second defendant on the letters dated 17 May 2001 and 22 May 2001 to show that there was a valid, subsisting and enforceable contract was entirely misconstrued.

Conclusion

For the reasons as adumbrated above, I gave an order in terms of encl. (1) for prayers (1), (2), (3), (4), (5), (6) and (7) thereto.